# United States Circuit Court of Appeals

## For the Ninth Circuit

E. V. WINTERMOTE, *Trustee* of the Estate of BLUMAUER LUMBER COMPANY, a corporation, Bankrupt, *Appellant*,

vs.

T. H. MACLAFFERTY, *Appellee.*

No. 2718

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

# BRIEF OF APPELLANT

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## STATEMENT OF THE CASE.

The bankrupt was a corporation engaged in the manufacture and sale of lumber and in the operation of a wood turning factory. Its average daily output in lumber was approximately sixty-five thousand feet, and its capacity ninety thousand

feet. Mr. T. H. MacLafferty, the claimant and appellant here, was the corporation's general manager, employed at a salary of three hundred dollars per month. He was one of its trustees and its secretary. Up to sixteen or eighteen months prior to bankruptcy he owned ten per cent. of the shares of capital stock. His duties as general manager consisted of general direction and supervision of the entire activities of the corporation. He oversaw the logging, sawmill and factory operations, made and directed sales, supervised the office work, and in the capacity somewhat of a master mechanic inspected and repaired the Company's machinery. The performance of this last duty, when necessary, involved the doing of some amount of physical labor. Mr. MacLafferty had under him a woods foreman in charge of the logging, a shipping clerk in charge the piling and shipping of lumber, and a factory foreman in charge of the wood turning machines. There was no mill foreman. In the office were a bookkeeper and a stenographer. Mr. MacLafferty hired and fixed the compensation of everyone employed by the corporation except himself. He was employed by the Board of Trustees, of whom he was one, and his salary fixed by them. (Record pp. 5-9.)

The corporation was adjudged a voluntary bankrupt on October 3, 1914. At that time there was owing to Mr. MacLafferty, as the balance of his salary, earned within the six months next prior thereto, the sum of $1,477.78. For this amount he

filed a claim in this proceeding, asserting a lien and priority therefor, under and by virtue of the laws of the State of Washington. (Record pp. 2-3.) To this claim, in so far as it asserted a lien and priority, the trustee objected, for the reason that the claim did not state facts sufficiently to entitle the claimant thereto. (Record pp. 4-5.) It was the trustee's contention that the claimant was not one entitled to a lien and priority under the statutes of the State of Washington, giving a lien to persons performing labor in the operation of a corporation of the class of which the bankrupt was one, and further, that such statutes were supplanted by the provisions of the National Bankruptcy Act dealing with the same subject. The Referee, after a hearing, overruled these objections. (Record pp. 9-10.) A review of the order entered thereon was granted to the trustee and taken to the District Judge (Record pp. 10-13), who made the order, which is complained of on this appeal, affirming the Referee's order (Record p. 14). Thereupon this appeal was perfected. (Record pp. 14-20.)

## ASSIGNMENTS OF ERROR.

The following assignments of error are relied upon:

First. That the United States District Court for the Western District of Washington erred in concluding that the statutes of the State of Washington providing for priority of payment to labor claimants in insolvency proceedings were not supplanted by the provisions of the Bankruptcy Act of 1898 dealing with the same subject. (Record pp. 14-15.)

Second. That the Court erred in concluding that the claimant, T. H. MacLafferty, who was the secretary, one of the directors and a stockholder of the bankrupt corporation, was entitled to a lien under and by virtue of the laws of the State of Washington, for his services rendered to said bankrupt as its general manager. (Record p. 15.)

Third. That the Court erred in finding that the proof of claim filed by the claimant, T. H. MacLafferty, stated facts sufficient to entitle him to a lien or priority of payment. (Record p. 15.)

Fourth. That the Court erred in making its order affirming the order of the Referee allowing the claim of T. H. MacLafferty as a lien and priority claim and overruling the objections of the trustee thereto. (Record p. 15.)

## ARGUMENT.

The third and fourth assignment of errors are general, and are necessarily included in the first and second assignments and will be considered therewith and not otherwise.

The questions involved on this appeal are almost identical, both as to law and facts, with those involved in the case of *Keyes, trustee, v. Davie*, number 2717, on appeal before this court at this term, and submitted herewith. The attorneys for appellant and appellee in both cases are the same, and we will therefore not enter into a lengthy repetition of the argument which is already before the court in the *Davie* case, but will confine ourselves to a statement of the general principles and a citation of the cases sustaining the same, together with a few remarks on the difference which does exist between this case and the *Davie* case.

We will first discuss the second assignment of error.

*Appellee is not one entitled to a lien and priority under the provisions of the statutes of the State of Washington giving the same to persons performing labor in the operation of a corporation of the class of which the bankrupt was one.*

Appellee was General Manager of the bankrupt, supervising and managing all its affairs. He was Secretary and one of the board of Trustees. The court below allowed priority to his claim for salary

under the provisions of Section 1149, Remington & Ballinger's Annotated Codes and Statutes of Washington (Laws 1897, Chapter 43, Section 1). That section reads:

> "Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, sawmill, lumber or timber company, shall save a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corporation, which is used in the operation of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien."

Section 1150 id. (Laws 1897, Chapter 43, Section 2), reads:

> "No person shall be entitled to the lien given by the preceding section unless he shall, within ninety days after he has ceased to perform labor for such person, company or corporation, file for record with the county auditor of the county in which said labor was performed, or in which is located the principal office of such person, company or corporation in this state, a notice of claim, containing a statement of his demand, after deducting all just credits and offsets, the name of the persons, company or corporation, if known, with the statement of the terms and conditions of his contract ,if any, and the time he commenced the employment, and the date of his latest service, and shall

serve a copy thereof on said person, company or corporation within thirty days after the same is so filed for record."

Section 1153, id. (Laws 1897, Chapter 43, Section 5), reads:

"Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall require such receiver or assignee to pay all claims for which a lien could be filed under this chapter, before the payment of any other debts or claims other than operating expenses."

The purpose of these statutes, as stated uniformly in the cases construing similar enactments, is to protect persons in inferior and subordinate positions engaged in tasks of a manual, menial or clerical nature, for which the compensation is small, and to whom the modest amount of their wages is an object of necessity and importance, and who are poorly equipped and qualified to protect themselves and care for their own concerns.

*Coffin v. Reynolds*, 37 N. Y. 640.

*In re Stryker* (N. Y. Ct. of App.), 53 N. E. 525.

*Oliver v. Macom Hardware Co.*, 98 Ga. 249, 58 Am. St. Rep. 300.

*Pullis Bros. Iron Co. v. Boember*, 91. Mo. App. 85.

Sound reason based upon public policy and welfare demands that the wages and earnings of such

persons be protected, but such reason does not apply to claims of the nature of that of the appellee here. The appellee was in control of the corporation's affairs and was fully cognizant of its financial condition, and was undoubtedly to some degree responsible therefor. With full knowledge of the company's condition he allowed his salary to accumulate to the sum of approximately $1,500. It is only the wages of those who are dependent upon their earnings for their daily sustenance which the statute intends to protect. It does not apply to those who are in a position to let their earnings accumulate. As stated in Re *Grubb, Wiley Grocery Co.* (D. C. Mo.), 96 Fed. 183, it would be a strange state of affairs, indeed, if the persons in charge of a corporation could, after voting themselves salaries *ad libitum*, and, by their mismanagement, wrecking the concern, then be preferred in the amount of their salaries to the exclusion of the general creditors who sold property and extended credit upon their solicitation.

See, also, *People v. Remington*, 52 N. Y. 329.

The class which is preferred by the statutes above quoted is "persons performing labor.' The basic word in this phrase is "labor." The meaning of this word in common parlance is, as defined in the dictionaries, services of a manual, menial or clerical nature. It is services rendered by persons whom public policy demands should be secured and protected in the amount of their scant earnings. One

who performs "labor" is most appropriately described as a "laborer." The statutes of many states describe the class entitled to priority by terms of broader significance than do the statutes in question here. In many the word "employes," of concededly broader meaning, is used. These cases uniformly hold that such persons as the appellee here are not included within the class entitled to priority.

*In re Stryker* (N. Y. Ct. of Ap.), 53 N. E. 525.

*Michigan Trust Co. v. Grand Rapids Democrat*, 113 Mich. 615, 71 N. W. 1102, 67 Am. St. Rep. 486.

*Pennsylvania & Delaware R. R. Co. v. Leuffer*, 84 Pa. St. 168, 24 Am. Rep. 189.

*In re Directors of American Lace & Fancy Paper Co.*, 51 N. Y. Sup. 818.

*Lewis v. Fisher* (Md.), 30 Atl. 608.

*Casualty Insurance Co.* case (Md.), 34 Atl. 778.

*In re Carolina Cooperage Co.* (D. C. N. C.), 96 Fed. 950.

*In re Albert O. Brown* (D. C. N. Y.), 171 Fed. 281.

*In re Crown Point Brush Co.* (D. C. N. Y.), 200 Fed. 882.

*In re Continental Paint Co.* (D. C. N. Y.), 220 Fed. 89.

This case differs from the *Davie* case submitted herewith only in the fact that the appellee here was

not an owner of the capital stock of the corporation during the period shortly prior to the initiation of the bankruptcy proceedings, and in that the appellee here on occasions, when necessity demanded, performed some physical labor in making repairs on machinery. Neither the amount nor the frequency nor the value of this physical labor appears, and it is conceded that appellee was employed and paid by the Board of Trustees for his services as General Manager. Undoubtedly, all general managers of companies carrying on business similar to that of the bankrupt here do some amount of physical labor. That, however, is not the primary purpose for which they are employed and paid.

In the case of *Blessing v. Blanchard* (C. C. A. 9th Cir.), 223 Fed. 35, the general maneger of an automobile concern employed at $300.00 per month worked also in the capacity of a salesman. This court did not for that reason sustain his claim to priority.

In *Re Greenberger* (D. C. N. Y.), 203 Fed. 583, the claim before the court was that of a manager of a branch store of a bankrupt. It appeared that he swept the floors, kept books and sold goods. The court said in denying his claim to priority under Section 64b cl. 4 of the Bankruptcy Act of 1898:

> "It would hardly do to hold that the general manager of the business of a corporation or individual, employed and paid as such, becomes entitled to priority for the reason that he incidentally sweeps the floor, dusts the counters,

> and assists in selling goods. Adopt this rule, and general managers of a business would be sure to do enough menial work to bring themselves within the section of the Bankruptcy Act giving priority to workmen, clerks, salesmen and servants."

The court below relied chiefly upon *In re Lawler*, 110 Fed. 135, decided by Hanford, J., of the District Court from which this appeal is urged. We believe that decision is erroneous, and since it was rendered by the same court from which this appeal is taken, we feel that we are in a sense appealing from that decision, too, and that our attitude toward it should be the same as toward the decision in the present case. The court in that case construes the word "employes," contained in the title of the act, rather than the word "labor," contained in the body thereof. The services of the salesman which were allowed priority in that case were of a manual and menial character and are easily distinguishable from those of the appellee in the present case.

Hanford, J., in the decision of the Lawler case, applies what he terms to be a liberal construction under the provisions of Section 1147, Remington & Ballinger's Annotated Codes and Statutes of Washington. That section reads:

> "The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed, with a view to effect their objects."

This liberal construction is directed only for the purpose of *effecting the object* of the act, which is in no way *effected* by including the claim of the appellee in this case. Liberal construction as called for by this provision does not mean liberal construction of the class of persons entitled to priority, but applies to the other phases of the enactment, as for instance, to the property to which the priority attaches.

> *Nunz v. Cumberland Gap Park Co.* (Tenn.), 52 S. W. 999, 76 Am. St. Rep. 650, 47 L. R. A. 273.
>
> *People v. Remington*, 52 N. Y. 329.

The question presented on this appeal has never been before the Supreme Court of the State of Washington, and its decisions throw no light thereon. The case of *Cors & Wagner v. Ballard Iron Works*, 41 Wash. 390, 82 Pac. 713, is cited by the court below. A casual examination of that case will disclose that the question involved here was in nc way considered there.

We have examined a large number of decisions interpreting statutes similar to those in question here, and believe that the meaning applied to the word "labor" by the court in this case and in the *Davie* case, is the broadest ever given it by any court.

We will now consider the first assignment of error.

*The statutes of the State of Washington under which appellee claims a lien and priority is supplanted by the provisions of the National Bankruptcy Act dealing with the same subject.*

Appellee in this case filed no lien under the provisions of Section 1150, *supra.* If he is entitled to priority it is by virtue of the provisions of Section 1153, *supra.* That section provides the rank of payment of the claims of "persons performing labor" in case of the appointment of a receiver, and directs that such payment be before all other claims, excepting operating expenses. The inchoate right of lien which existed by virtue of Section 1149, *supra,* is thus converted into a priority. The legislature undoubtedly deemed that the orderly administration of insolvent estates demanded that a multiplicity of suits by reason of foreclosure of liens be avoided, and therefore substituted for the unperfected lien right a right to priority. If this priority is introduced into the Bankruptcy Act it is by virtue of the provisions of Section 64b cl. 5 thereof. Section 64b provides:

> "The debts to have proirity, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be * * * (4) wages due to workmen, clerks, travelling or city salesmen or servants, which have been earned within three months before the date of the commencement of the proceedings, not to exceed $300. to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority."

Section 64b cl. 4 is a specific enactment upon the question of the order and rank of payment of claims for labor. Can it be construed that the general language contained in Section 64b cl. 5 introduced into the act a different and conflicting provision with reference to the same subject? A well-known rule of statutory interpretation would indicate otherwise. See Suth. St. Const. Section 158.

In the following cases it has been held that Section 64b cl. 4 supplants Section 64b cl. 5 on the question of priority to labor claimants:

*In re Rouse, Hazard Co.* (C. C. A. 7th Cir.), 91 Fed. 96.

*In re Lewis* (D. C. Mass.), 99 Fed. 935.

*In re Shaw* (D. C. Pa.), 109 Fed. 782.

*In re Slomka* (C. C. A. 2nd Cir.), 122 Fed. 630.

*In re Crown Point Brush Co.* (D. C. N. Y.), 200 Fed. 882.

*In re Crawford Woolen Co.* (D. C. W. Va.), 218 Fed. 951.

See also Collier on Bankruptcy, 10th Ed., p. 912.

The Bankruptcy Act is entitled "An act to establish a uniform system of bankruptcy throughout the United States." Uniform as used in this title must mean uniform as between the several states. Congress undoubtedly had in mind in the enactment of this provision the various provisions of statutes

in the several states with reference to this subject. It found them not in harmony either as to the persons entitled to priority, the amount for which priority was given, or the limitation of time over which it extended. With this divergence in its knowledge, congress spoke on the subject specifically and particularly and limited the amount, the time and fixed the class of persons entitled thereunder. It is not to be presumed that congress in the general provision immediately following intended to derogate from this express enactment. It must be presumed to have intended what it stated with particularity, and not what might be inferred from the use of the general terms.

It is respectfully submitted that the order of the court below allowing the appellee a lien and priority should be reversed.

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